

# The Thurgood Marshall Collection: *Press Stories Stir Furor over LC's Opening of Papers*

On May 23, *The Washington Post* published the first of three articles on Supreme Court Justice Thurgood Marshall's papers, which he gave to the Library of Congress in October 1991. The articles have fueled a Washington debate over who should have access to the papers and whether the Library should have allowed any access at all.

The 173,700-item collection dates back to Marshall's early career when he served as a lawyer for the National Association of Colored People (NAACP) (1940-61), followed by his service as a federal appeals court judge (1961-65), U.S. solicitor general (1965-67) and Supreme Court justice (1967-91).

The *Post* articles, which contain descriptions of the Supreme Court's activities and procedures during Justice Marshall's tenure, have sparked interest among researchers who have flocked to the Library of Congress's Manuscript Division to examine the papers. The collection includes memos the justices sent to one another, draft opinions and decisions, vote tallies and other details about the court's day-to-day activities and procedures.

However, not everyone outside the Library agreed that open access to Justice Marshall's papers shortly after his death on Jan. 24 is appropriate.

Justice Marshall, in an Oct. 7, 1991, meeting with LC officials and in his Instrument of Gift, signed Oct. 24, 1991, agreed that (1) during his lifetime, researchers could use his papers only with his written permission and (2) thereafter, the papers were to be open. The only "discretion" the Library routinely sought—and obtained—in the Instrument was the limited discretion to decide when the papers were properly cataloged and ready for use.



*On Oct. 21, 1991, the Librarian wrote Justice Marshall, saying, "We will be happy to discuss any revisions you wish to propose" to the Instrument of Gift for Marshall's papers. The justice returned the Instrument unchanged and signed Oct. 24.*

Nevertheless, several of Justice Marshall's family members, previous associates and colleagues on the high court were surprised and upset by the *Post* stories. They disputed the Library's statement that Justice Marshall wanted his papers made available to "serious" researchers and scholars upon his death.

William T. Coleman, the Marshall family's attorney, described the opening of the papers as "an act of destroying confidentiality." Former Chief Justice Warren E. Burger, who served on the high court with Marshall for 17 years, claimed that his colleague "was keenly aware that premature publication of internal exchanges would inhibit and perhaps seriously impair the court's work."

Chief Justice William H. Rehnquist, in a May 25 letter to Librarian

of Congress James H. Billington, said the Library used "bad judgment" in its decision to grant such early access, adding that he spoke for "a majority of the active justices" in suggesting that some may choose to donate their papers elsewhere.

However, others, including librarians and legal scholars, have defended the Library's position. Juan Williams, a *Washington Post* reporter who interviewed Justice Marshall for an article in 1990, recalled that when he asked to review the justice's papers he was told, "They'll be available after I die."

On May 26, after a lengthy internal review, Dr. Billington met at length with William T. Coleman, the Marshall family's attorney; with Justice Marshall's widow, Cissy, and her son, Thurgood Marshall Jr.; and with Chief Justice Rehnquist to discuss the matter. He also issued a public statement to explain the Library's position. (The full text follows this article.)

The facts are clear. Dr. Billington; David Wigdor, assistant chief of the Library's Manuscript Division; and Debra Newman Ham, the division's specialist in Afro-American history, met with Justice Marshall in his chambers to discuss his donation on Oct. 7, 1991. Mr. Wigdor last week emphasized that Justice Marshall was very specific at the Oct. 7 meeting in stating his wish that his papers be made accessible after his death.

"Initially, he said that the collection should remain closed to all researchers during his lifetime," Mr. Wigdor recalled. "However, he also spoke favorably of two research projects about the Supreme Court that were currently under way. When I asked if he would consider making his papers available during

(Cont. on p. 252)

**Marshall Papers** (*Cont. from p. 231*) his lifetime for specific projects, but only with his written permission, he agreed instantly. But that was the only restriction he placed on his donation.

"I've dealt with several Supreme Court justices in this and other matters," added Mr. Wigdor, who has been with the Library since 1975 and has served in his current position since 1985.

Marshall was not the first to order his papers opened upon his death. "Different justices have handled their papers in different ways," said Mr. Wigdor. "But all of them understand the significance of their papers and know what they want to do with them. In my experience with a variety of donors over the years, the justices are more familiar with and have a better understanding of these collections than do many other people in public life."

On Oct. 21, 1991, Dr. Billington sent the Instrument of Gift to Justice Marshall, with a cover letter saying, "We will be happy to discuss any revisions you wish to propose." Justice Marshall returned the Instrument unchanged and signed Oct. 24.

On June 30, 1992, the Library sent to Justice Marshall an essay describing his collection. On July 8 Justice Marshall "sent word that he was pleased with our description of the collection," Dr. Billington recently said. The essay, written by Debra Newman Ham, was destined for the Manuscript Division's widely circulated 1991 acquisition report and as such, Dr. Billington pointed out, was "in effect, an invitation to use the Marshall Collection."

The Library received Justice Marshall's papers in December 1991 and completed processing the collection in September 1992. When Justice Marshall died on Jan. 24, the papers were officially opened. The first research request was made and granted on Feb. 2, 1993. (The LC *Information Bulletin* described the col-

## The Marshall Papers: A Chronology

□ **Jan. 29, 1965:** First LC request for Thurgood Marshall's papers.

□ **Feb. 8, 1965:** Marshall responds, "I have no personal papers. They all remained in the files of the NAACP and NAACP Legal Defense and Educational Fund Inc."

□ **Oct. 4, 1977:** Another Library of Congress solicitation, from John Broderick, then chief of the Manuscript Division, writes: "Mutually acceptable restrictions may, of course, be placed upon the use of a collection."

□ **July 2, 1991:** Librarian of Congress James H. Billington makes solicitation after Marshall first announces his retirement.

□ **July 22, 1991:** Justice Marshall writes Dr. Billington: "I contemplate leaving my papers to the Library of Congress when I finally retire."

□ **Sept. 4, 1991:** Dr. Billington writes Marshall thanking him for news of July 22 and invites him to lunch.

□ **Oct. 7, 1991:** Dr. Billington; David Wigdor, assistant chief of the Manuscript Division; and Debra Newman Ham, Afro-American specialist in the division, are summoned to visit Marshall in his chambers. Marshall tells group that his papers will be available with permission during his lifetime and after his death without restrictions.

□ **Oct. 21, 1991:** Dr. Billington sends letter to Marshall forwarding Instrument of Gift: "We will be happy to discuss any revisions you wish to propose. If it is satisfactory in its current form, simply sign and return. . . ."

□ **Oct. 24, 1991:** Justice Marshall signs Instrument of Gift, without change, donating papers to the Library.

□ **Dec. 1991-Jan. 1992:** Marshall's papers, initially 147,800 items (eventually 173,700), arrive at the Library.

□ **Feb. 27, 1992:** Dr. Billington sends letter to Marshall, along with the completed Instrument of Gift, thanking him again and saying, "We are certain that researchers visiting the Library of Congress to use them through ensuing generations will agree that these papers embody the life and career of an American ceaselessly at work toward his ideal of a just society."

□ **June 3, 1992:** Processing begins on Marshall's papers in the Manuscript Division.

□ **June 30, 1992:** James Hutson, Manuscript Division chief, sends letters to Marshall and other justices asking them to review and approve staff essays describing their papers for publication in 1991 acquisitions report.

□ **July 8, 1992:** Marshall's assistant, Janet McHale, calls Janice Ruth of the Manuscript Division about the essay to say Marshall "is pleased with it—no problem—no changes needed."

□ **Sept. 30, 1992:** Processing completed; shortly thereafter, Ms. Newman Ham calls Ms. McHale to report that papers are ready for use.

□ **Jan. 24, 1993:** Marshall's death; his papers become available to researchers.

□ **Feb. 23, 1993:** Dr. Billington sends letter to Mrs. Marshall following his attendance at Marshall's funeral, expressing condolences, asking her to visit the Library to see how LC processed the collection and enclosing a copy of the Manuscript Division 1991 acquisitions report describing the Marshall holdings.

## The Instrument of Gift

*Following is the Instrument of Gift signed by Thurgood Marshall Oct. 24, 1991, donating his papers to the Library of Congress. It was sent to him Oct. 21, 1991, with a cover letter offering to discuss any changes he wished to propose. Justice Marshall returned it unaltered:*

I, Thurgood Marshall (hereinafter: Donor), hereby give, grant, convey title in and set over to the United States of America for inclusion in the collections of the Library of Congress (hereinafter: Library), and for administration therein by the authorities thereof, a collection of my personal and professional papers, more particularly described on the attached schedule.

I hereby dedicate to the public all rights, including copyrights throughout the world, that I may possess in the Collection.

The papers constituting this gift shall be subject to the conditions hereinafter enumerated:

1. Access. With the exception that the entire Collection shall be at all times available to the staff of the Library for administrative purposes, access to the Collection during my lifetime is restricted to me and others only with my written permission. Thereafter, the Collection shall be made available to the public at the discretion of the Library.

2. Use. Use of the materials constituting this gift shall be limited to

private study on the premises of the Library by researchers or scholars engaged in serious research.

3. Reproduction. Persons granted access to the Collection may obtain single-copy reproductions of the unpublished writings contained therein.

4. Additions. Such other and related materials as the Donor may from time to time donate to the United States of America for inclusion in the collections of the Library shall be governed by the terms of this Instrument of Gift or such written amendments as may hereafter be agreed upon between the Donor and the Library.

5. Disposal. It is agreed that should any part of the Collection hereinabove described be found to include material which the Library deems inappropriate for permanent retention with the Collection or for transfer to other collections in the Library, the Library may dispose of those materials in accordance with its procedures for the disposition of materials not needed for the Library's collections.

In witness whereof, I have hereunto set my hand and seal this 24th day of October 1991, in the city of Washington, D.C.

(signed) Thurgood Marshall  
Accepted for the United States of America

(signed) James H. Billington  
The Librarian of Congress  
November 8, 1991

lection on Feb. 22, 1993.) *The Washington Post* first came to use the papers May 5.

In response to critics' charges that making the papers available to the press violates Marshall's stipulation in his Gift of Instrument that access be granted only to "researchers and scholars engaged in serious research," Dr. Billington last week

noted that, as Justice Marshall was aware, the Library has a long-standing policy of granting access to a broad range of researchers, including authors, lawyers and journalists.

(Every patron who visits the Manuscript Division must be over college age, engaged in serious research that the manuscript collec-

tions can support and obtain a library user's card, which requires showing a photo ID and describing the general purpose of the work.)

Mr. Wigdor firmly denied charges by Crystal Nix and Sheryll D. Cashin, two of Justice Marshall's former law clerks, that the Library was violating its "previous practice of withholding recent documents" about recent court cases written by the justices.

"The Library has never established its own special restrictions on access to elements of a collection donated to the Library," he declared. "Only two sets of restrictions can be imposed: those set by the donor of the material and official restrictions and procedures that the information security statutes and regulations apply to security-classified materials."

Mr. Wigdor added that during the key Oct. 7, 1991, meeting, he and Justice Marshall discussed the fact that the latter's papers contained some classified items from his days as U.S. solicitor general. Mr. Wigdor discussed the measures the Library employs to protect such information, which is made available only to individuals with the proper clearance.

"We have conducted a thorough review of our internal documents and dealings with Justice Marshall," said Dr. Billington in his May 26 statement. "We remain confident that we are carrying out his exact intentions in opening access to his papers after his death on January 24. In so doing, we have followed traditional library practice of strict adherence to the donor's explicit instructions. This has been our practice with collections left to the Library by all donors, including 12 other recent justices of the Supreme Court. To do otherwise is a breach of contract and a violation of the trust placed in the Library by the donor."

—Barbara Bryant  
(Text of Dr. Billington's statement begins on next page)

*Following is the complete statement of Librarian of Congress James H. Billington on the Library's handling of the papers of Justice Thurgood Marshall, issued May 26:*

We were surprised and distressed by the concerns voiced by the Marshall family, Chief Justice Rehnquist, the Honorable William Coleman and others over the opening of the papers of the late Thurgood Marshall, Associate Justice of the Supreme Court and a giant figure in the history of the civil rights struggle.

I have met today with the Marshall family, the Chief Justice and Mr. Coleman to discuss their concerns, review the Library's discussion and correspondence with Justice Marshall and explain the Library's guiding philosophy on access to its collections.

We have conducted a thorough review of our internal documents and dealings with Justice Marshall. We remain confident that we are carrying out his exact intentions in opening access to his papers after his death on January 24.

In so doing, we have followed traditional library practice of strict adherence to the donor's explicit instructions. This has been our practice with collections left to the Library by all donors, including 12 other recent justices of the Supreme Court. To do otherwise is a breach of contract and a violation of the trust placed in the Library by the donor.

Requests in the wake of recent articles to impose additional restrictions on Justice Marshall's papers run counter both to this basic principle of custodianship and to Justice Marshall's expressed intentions to us. We have the greatest sympathy for Chief Justice Rehnquist, Justice Marshall's family and others who have voiced concern. But the Library must honor the expressed wishes of one of our great jurists. Open access to the papers, as called for in Justice Marshall's instrument of gift, must be maintained.

Crucial to a free and democratic society is open access to information, limited only by formal secrecy classification and by specific restrictions laid down by the donors of papers.

In the case of Justice Marshall, following his death, the use of the papers "is limited to private study on the premises of the Library by researchers or scholars engaged in serious research."

One of the concerns that has been raised is that journalists ought not to be considered researchers. The term "researchers," under Library policy, has always referred to adults working on specific research projects, be they authors, journalists or lawyers. Justice Marshall was aware that journalists used Library manuscript collections; indeed, during our meeting on his papers in October 1991, he mentioned with approval to me a particular book by a journalist on a fellow Supreme Court justice using his papers in the Library.

All who seek to use the Marshall papers—or any other open papers in the Library's manuscript collection—must register, present a photo I.D., state their names, addresses, institutional affiliations and their research projects. Casual tourists and high school students are turned away. Undergraduates are normally encouraged to go elsewhere, although any adult may use the Library's general collections.

There has been some confusion over the "discretion" allowed to the Library under the terms of Justice Marshall's Instrument of Gift, signed Oct. 24, 1991. As in the case of other collections, the "discretion" sought and obtained by the Library involved only the technical determination by our archival staff of when the papers were organized and ready for use. It is an abuse of such "discretion" to impose restrictions on access other than those proposed by the donor.

Under the Instrument, his papers

were to be made available during his lifetime to researchers "only with my written permission." After his death, "the collection shall be made available to the public at the discretion of the Library."

Justice Marshall was quite clear in his meeting with me and other Library specialists earlier that month that he wanted his papers to be opened upon his death. He and we, of course, did not know when that would be.

Justice Marshall had ample opportunity to add restrictions if he so chose. In my letter of Oct. 21 forwarding the Instrument of Gift to Justice Marshall for his signature, I wrote: "We will be happy to discuss any revisions you wish to propose."

He proposed none. He signed the Instrument of Gift with no changes on Oct. 24.

The restrictions placed by Supreme Court justices on access to their papers have varied with the individual. Justice Marshall is not the first Justice to ask that his papers be opened immediately following his death. Associate Justice Burton gave unlimited access after his death. Associate Justice Douglas permitted major portions of his papers to be made available immediately on his death. Associate Justice Goldberg allowed his papers to be open during his lifetime (but after he left the Court). Justice White's Instrument of Gift allows access to individual researchers with his permission during his lifetime, then no access for 10 years. Chief Justice Warren allowed no access to his papers until 1985.

Some have argued that opening Justice Marshall's papers now threatens the privacy of Supreme Court deliberations. The Library does not hold itself above the law; it obeys federal document classification edicts and follows the restrictions imposed by donors of papers. We have nothing but respect for the Court and its members. But we cannot serve as the Court's watchdog.

In the recent past, as is well known, outside the Library of Congress, both journalists and scholars have gained access to Supreme Court documents and produced articles and books on its deliberations. We are surprised to have the Library of Congress called upon to enforce a tradition of confidentiality which the Court itself has yet clearly to establish.

In the case of Justice Marshall, the Library has sought his papers since 1965, even before he was appointed to the court. On July 2, 1991, after Justice Marshall announced his impending retirement, we again wrote him asking him to donate his papers to the Library of Congress.

In a letter on July 22, 1991, Justice Marshall said he was considering the Library's invitation.

On Oct. 7, 1991, David Wigdor, assistant chief of the Manuscript Division, Debra Newman Ham, the Manuscript Division's specialist in African-American history, and I met with Justice Marshall in his chambers. The Justice set the agenda. He was fully in charge and clearly told us to make his papers accessible after his death. There was no extended discussion of various options or restrictions, although we discussed how restricted access would be provided during his lifetime and how security classified materials from his service as Solicitor General would be protected. The Justice accepted a suggestion by David Wigdor that during Marshall's lifetime the papers would be available to researchers with his written permission—a common provision.

On Oct. 21, I sent Justice Marshall an Instrument of Gift, with a covering letter. In that letter I wrote that we would "be happy to discuss any revisions you wish to propose. If it is satisfactory in its current form, simply sign and return both copies to me."

Justice Marshall proposed no revisions. He signed the Instrument of

Gift unchanged on Oct. 24 and sent it back to me.

In December 1991, we began moving Justice Marshall's papers—173,000 items in all—to the Library. Processing them began in June 1992 and was completed last September. On June 30, 1992, we sent a draft to Justice Marshall of an essay describing his papers—an essay destined for the Library's 1991 *Acquisitions Report*—asking for comments or corrections. On July 8, 1992, his assistant, Janet McHale, called the Library to say that Justice Marshall was pleased with the essay and welcomed its publication, which was in effect an invitation to use his papers.

The Library received no requests to use the Marshall papers during the Justice's lifetime. On January 24, 1993, Justice Marshall died, a towering figure mourned by the nation. Dr. Ham and I were among those who attended the memorial service in the National Cathedral. In accordance with his wishes, his papers were opened. (By May 5, when a *Washington Post* reporter arrived, six researchers had already used the collection.) On Feb. 23, 1993, I wrote to Mrs. Marshall, expressing my sympathy, asking her to visit the Library and the Marshall Collection.

Restricting or suspending access to the Marshall papers now would cast doubt on the Library's ability to carry out the instructions of a deceased donor. In the public interest, and in accordance with the expressed intent of one of our great jurists, we cannot in good faith suspend or otherwise restrict access to the Marshall papers, as some have requested.

We remain confident that we are complying with Justice Marshall's intentions regarding access to his papers. We are deeply concerned that the language of the Instrument of Gift may have been misunderstood by some. I have therefore directed Library staff to develop language for use in subsequent Instru-

ments to reexamine access policies and ensure that future donors' intentions are not subject to any misinterpretation outside the Library.

We are genuinely sorry that we cannot accommodate the desire of many good people to restrict access to his collection. No desire to do so or countervailing view of Justice Marshall's intentions was communicated to the Library before the press articles. We particularly sympathize with the concerns that have since been expressed to me by the family and by many in the judiciary system about what has appeared in the press.

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**Six-Month Plan** (*Cont. from p. 236*) Resources as vital to the plan's success: Human Resources should have adequate staff with the expertise to do the complex job; the Library's personnel data bases, both those maintained at LC in the past and at the National Finance Center since July 1990, must be accurate and up to date.

**Timeliness.** The six-month plan puts special emphasis on ending undue delays in the personnel process: "It is essential that our competitive selection process not only be fair and equitable, but timely. As our personnel specialists learn the new system, we want the process to move along expeditiously."

**Monitoring of Consultant Contracts/Performance Standards of Managers.** Finally, the six-month plan looks toward better oversight and monitoring of the Library's personnel services and consultant contracts to ensure that contractors are recruited from diverse sources. It aims at revising existing criteria for measuring senior level performance in the areas of equal employment opportunity and affirmative action. It also looks toward implementing a performance plan for managers and supervisors at the GS-15 level and below.

—Helen Dalrymple